IN THE

Supreme Court of the United States

October Term, 1969

No. 153

DANIEL MCMANN, Warden of Clinton Prison, Dannemora, New York, and HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioners,

against

WILBERT ROSS, WILLIE RICHARDSON, FOSTER DASH and MCKINLEY WILLIAMS,

Respondents.

BRIEF OF DISTRICT ATTORNEY OF NEW YORK COUNTY, *AMICUS CURIAE,* IN SUPPORT OF PETITIONERS

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Introduction—Interest of *Amicus*

The District Attorney of New York County supports the brief filed by the Attorney General of the State of New York, not only because one of the respondents was convicted in New York County of a serious crime, but because the issue presented directly affects the cases of numerous

State prisoners who, being the worst offenders, are still in custody. For example, on a conclusory habeas corpus claim that his plea of guilty was "induced" by "the existence of a certain written inculpatory statement * * *, which was given after the uttering of threats by police officials" (Appendix, pp. 2-3), respondent Wilbert Ross, an acknowledged murdered, has been granted an evidentiary hearing on the issue of voluntariness of the "statement," notwithstanding the complete absence of any claim of coercion before the case became final, and although the "statement," if any, was never introduced in evidence, since Ross pleaded guilty. Thus the Circuit court, repudiating long-standing decisions of the New York Court of Appeals, has needlessly extended to countless State prisoners an open invitation to come to the courtroom for a hearing in cases which were reasonably considered closed, an invitation redeemable merely upon presentation of easily drafted claims as to inadmissibility of evidence, and as to the subjective "motivation" for pleas of guilty. Because the Circuit court's wrongly decided ruling would impose an intolerable and unnecessary burden on the administration of criminal justice in New York County, we submit our brief as *amicus curiae* in support of petitioners.

Question Presented

Whether a defendant who voluntarily pleaded guilty prior to *Jackson* v. *Denno,* 378 U.S. 368 (1964), is now entitled to a hearing on the admissibility of alleged statements to the police?

ARGUMENT

Jackson v. _Denno_ should not be applied retroactively to defendants who pleaded guilty.

The United States Court of Appeals for the Second Circuit, by a 6-3 vote, has expanded drastically the opportunity to attack a conviction based upon a plea of guilty, if the plea was entered prior to *Jackson* v. *Denno,* 378 U.S. 368 (1964). The Court ruled that an evidentiary hearing is required in a State court when a petitioner alleges sufficiently that his plea of guilty, entered before the *Jackson* ruling on June 22, 1964, was "substantially motivated" by a coerced confession. "The conviction would stand, of course," the Circuit court reassured, "if the State court found after full and fair evidentiary hearing, either that the confession was voluntary or that the plea was not substantially motivated by the confession" (Appendix, p. 122, n. 4).

The crux of the Court of Appeals' decisions was that a non-jury hearing as to voluntariness of a confession, "constitutionally acceptable" under present standards, was not required and available in New York State until the *Jackson* decision, years after the respondents' pleas of guilty (Appendix, pp. 122, 124-5; see also concurring opinion, pp. 131-3). Hence, a *Jackson-Denno* hearing was not deliberately "waived" by the plea. *Ergo,* the plea of guilty is tainted. This syllogism, the last word of the federal courts in this jurisdiction,* has devastating logical consequences. Under

* The decisions of the United States Court of Appeals for the Second Circuit are, of course, binding upon the District Courts in the Circuit, from which State prisoners may seek writs of habeas corpus. Further, the reasoning of the decisions would extend to cases of State prisoners convicted in at least 14 states other than New York, and federal prisoners convicted in 6 federal judicial districts, for these

the reasoning of the Circuit court, every judgment entered upon a plea of guilty is subject to attack if subsequently there is a change in the constitutional law relating to criminal procedure or admissibility of evidence. In this instance, respondents were held to be entitled retroactively to a *Jackson* hearing, since none was available when they pleaded guilty. By the same token, defendants who pleaded guilty prior to *Bruton* v. *United States*, 391 U.S. 123 (1968) would be entitled to petition for an evidentiary hearing to determine whether their pleas were "substantially motivated" by an expectation that they would be tried jointly with other defendants whose confessions implicated them.

In so ruling, the Court of Appeals misconstrued the nature of the "waiver" that underlies an acceptable plea of guilty. The validity of a plea of guilty in cases disposed of prior to 1964 is totally unaffected by the absence of a deliberate, intentional "waiver" of a *Jackson* hearing. Indeed, the only *previously* announced constitutional rights that must be knowingly and understandingly "waived" for the plea of guilty to be accepted are, at most, the rights recently enumerated by this Court in *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969):

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jurisdictions lacked an acceptable *Jackson*-type hearing prior to June 22, 1964. See *Jackson* v. *Denno*, 378 U.S. 368, 406 (1964) (dissenting opinion of Mr. Justice BLACK). However, the New York Court of Appeals, unpersuaded by the strained reasoning of the Circuit court in the instant cases, has declined to require hearings on similar petitions, pending further word as to the efficacy of these holdings. *People* v. *Rolon*, —— N.Y.2d —— (October 29, 1969), N.Y.L.J. November 3, 1969, p. 2, col. 1; see also *People* v. *Terry*, N.Y.L.J. April 22, 1969, p. 18, col. 6 (Sup. Ct. 1969); *People* v. *Serra*, N.Y.L.J. June 4, 1969, p. 33, col. 8 (Sup. Ct. 1969); *People* v. *Tinsley*, N.Y.L.J. September 11, 1969, p. 13, col. 6 (Sup. Ct. 1969).

"Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. *Malloy* v. *Hogan*, 378 U.S. 1. Second, is the right to trial by jury. *Duncan* v. *Louisiana*, 391 U.S. 145. Third, is the right to confront one's accusers. *Pointer* v. *Texas*, 380 U.S. 400."

Moreover, defendants need not be shown to have knowingly waived every procedural right that *subsequent* judicial decisions have added. In effect, a plea of guilty relinquishes the benefit of subsequently announced procedural rights that, as here, do not affect the reliability of the plea of guilty—even if those rights are applied retroactively to cases where there was a trial. This is implicit in the bargain which is struck when a defendant foregoes his right to a trial, as in the instant cases, in return for the benefits of a lesser plea. As this court recently noted, "some defendants benefit from the new rule while others do not, solely because of the fortuities that determine the progress of their cases from initial investigation and arrest to final judgment. The resulting incongruities must be balanced against the impetus the technique [prospective decision-making] provides for the implementation of long overdue reforms, which otherwise could not be practicably effected." *Jenkins* v. *Delaware*, 395 U.S. 213, 218 (1969). One wonders whether this Court, which was closely divided in *Jackson*, could have contemplated that its novel decision would be construed to require evidentiary hearings as to the admissibility of evidence at trial where there never was a trial. In a criminal justice system which disposes of "about 80% of all charges of serious crime and of about

95% of all convictions of such crimes" by pleas of guilty, and which encourages progress and procedural reforms through judicial decisions, the Circuit court's ruling is intolerable and not constitutionally required (*cf.* Appendix, pp. 138-9 [dissenting opinion of LUMBARD, C.J.]).

The Circuit court's decisions in the instant cases not only misinterpret the "waiver" implicit in a plea of guilty, they conflict with settled principles of retroactivity, which establish the inapplicablity of new rulings such as *Jackson* v. *Denno* to cases that had already been disposed of upon pleas. In determining questions of retroactivity, this Court has applied three now-familiar criteria:

> "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967); see also *Halliday* v. *United States*, 394 U.S. 831, 832 (1969).

Applying these tests, it has been held that the application to State trials of the Sixth Amendment right to a jury trial for serious offenses is not retroactive to trials that have already occurred without a jury. *DeStefano* v. *Woods*, 392 U.S. 231 (1968). Judicial extension of the right to counsel at pre-trial identification proceedings is inapplicable to line-ups that have already occurred. *Stovall* v. *Denno, supra.* The *Miranda* decision does not apply to trials that had already begun when this Court prescribed the *Miranda* warnings, or to retrials of cases which originally had been tried prior to the *Miranda* decision. *Jenkins* v. *Delaware, supra; Johnson* v. *New Jersey*,

384 U.S. 719 (1966). Similarly, recent changes in rulings as to the admissibility of evidence obtained by wiretapping do not apply to wiretapping that had already occurred. *Desist* v. *United States*, 394 U.S. 244 (1969).

With respect to the first criterion of retroactivity, the purpose of the *Jackson* decision was provision for a "reliable" procedure for testing federal claims as to voluntariness of a confession that is "offered in evidence at the trial." 378 U.S. at 377. Retroactivity is not indicated where there was no trial at all, and no pre-trial confession was advanced as proof. A plea of guilty "serves as a stipulation that no proof by the prosecution need be advanced • • • It supplies both evidence and verdict, ending the controversy • • •." *Boykin* v. *Alabama*, *supra*, 395 U.S. at 242-243, n. 4. Requiring hearings before judges without a jury on the question of voluntariness of a confession offered at trial has no relation to the reliability of the judgment-rendering process where the judgment is based on a plea of guilty; hence, there is no need for retroactivity. By contrast, the holding in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), that indigent defendants are entitled to free counsel, deserved retroactive application even where the convictions rested upon pleas of guilty, for the reliability of an uncounseled plea of guilty is suspect. But it is difficult to conceive of any other case, involving newly announced rights applicable to a trial, that should be applied retroactively to pleas of guilty. Indeed, the majority of the court below suggests not one whit that its ruling is related to the reliability of the plea of guilty. Nor did the respondents suggest in their habeas corpus petitions any relationship between the reliability of their pleas of guilty and the

unavailability of a *Jackson* hearing prior to 1964, when their pleas were entered. The remoteness from the question of reliability of the plea is highlighted by considering the status of the law when the plea was entered, prior to the *Jackson* decision. In 1955, when respondent Ross pleaded, methods reasonably considered adequate were available for testing voluntariness of confessions offered at trial, as was pointed out below in the dissenting opinion of Judge FRIENDLY. Hence, the unavailability of an alternative method could not have affected the truthfulness of the plea.

It is also clear that the second test of retroactivity, reliance by public officers, warrants prospectivity of *Jackson* where there was a plea of guilty. Judges, prosecutors, and others responsible for the administration of justice were entitled to rely on authoritative pronouncements by this Court and the New York Court of Appeals upholding the existing State procedure for testing voluntariness of confessions that were offered at trial. See *Stein* v. *New York*, 346 U.S. 156 (1953); see also *Jackson* v. *Denno*, *supra* at 395. The court below offered no suggestion as to how a plea of guilty could have been taken in 1955 in a manner that would now be considered acceptable by a majority of that court.

Finally, substantial disruption in the administration of justice would occur if cases disposed of upon pleas of guilty prior to June 22, 1964 had to be reopened for evidentiary hearings as to the admissibility of evidence. Petitioners' brief and the dissenting opinion of Chief Judge LUMBARD document the enormous number of convictions entered upon pleas of guilty that would be affected by the broad rulings of the Second Circuit. The proportion of cases of

indicted defendants who pleaded guilty prior to *Jackson* in which statements were elicited is substantial, reaching perhaps 85% in murder cases,* and more than 80% in non-homicide felony cases in New York County (see Appendix, *infra*).

It is no reassurance to assert, as was done in the majority opinion in the *Ross* case, that after a "full * * * evidentiary hearing" the conviction could stand if "the confession was voluntary" or "the plea was not substantially motivated by the confession." Requiring hearings is itself a major disruptive factor. To add innumerable such cases to the calendars of the Supreme Court in New York City and other busy trial courts, where the backlogs of indictments awaiting trial are already large (in New York County the typical homicide case is tried a year after the indictment), is an unreasonable, unnecessary burden on the administration of justice. With the facilities of the courts, prosecutors, police and defense bar already overtaxed with pre-trial hearings on issues created by recent decisions, an additional weight should not be imposed without urgent reasons not apparent in the present case. Nor may it lightly be assumed that the issues set forth by the Circuit court could readily be litigated. In cases at least 5 years old, the voluntariness of the confession, and even its very existence, are questions not readily susceptible of resolution in cases entered upon pleas of guilty, where, because of the pleas, testimony and records have not been preserved, and memories are understandably stale. Simi-

* The supplementary memorandum filed by the Attorney General of the State of New York and the National District Attorneys' Association as *amicus curiae* in support of respondent in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), showed that of the last 100 defendants executed in New York State for murder in the first degree, 85 had made statements to the police.

larly, an evidentiary hearing as to whether a plea of guilty prior to 1964 was "substantially motivated" by a confession is an inquiry into the metaphysical. Indeed, if the Circuit court's opinion in *Ross* is carried to its logical conclusion, the defendant should prevail if he thought the confession was "coerced" and pleaded guilty substantially because of the confession, regardless whether or not the confession was in fact voluntary.

Assuming that this examination as to the confession, or as to the motivation for the plea, resulted in a nullification of the plea of guilty, the State would be seriously handicapped in its efforts to prosecute the underlying criminal charge. The Circuit court overlooked "society's legitimate concern that convictions already validly obtained not be needlessly aborted." See *Jenkins* v. *Delaware, supra,* 395 U.S. at 219. In *Jenkins,* this Court was persuaded substantially by "the increased evidentiary burdens that would result if we were to insist that *Miranda* be applied to retrials." *Ibid.* Similarly, "because of the increased evidentiary burden that would be placed unreasonably upon law enforcement officials" [*ibid.*] by insisting that *Jackson* v. *Denno* be applied retroactively to cases previously disposed of upon pleas of guilty, the *Jackson* case should not apply in the cases at bar.

Plainly, the opinion of the Court of Appeals in the *Ross* case is wholly inconsistent with the recent decision of this Court in *Halliday* v. *United States,* 394 U.S. 831, (1969). Shortly before *Halliday,* this Court had held that when a guilty plea is accepted in a federal court in violation of Rule 11 of the Federal Rules of Criminal Procedure, the defendant must be afforded an opportunity to

plead anew. *McCarthy* v. *United States,* 394 U.S. 459 (1969). *Halliday* held that *McCarthy* should not be applied to guilty pleas which were accepted prior to the date of the *McCarthy* decision. While acknowledging that strict compliance with Rule 11 unquestionably "enhances the reliability of the voluntariness determination," the Court reaffirmed its pronouncement in *Stovall* v. *Denno, supra,* that the extent to which a " 'condemned practice affects the integrity of the truth-determining process * * * must be * * * weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice.' " 394 U.S. at 833. In the case at bar, the absence of *Jackson* hearings prior to 1964 did not affect the truthfulness of the plea, reliance on the pleading process prior to *Jackson* was clearly justified, and the disruptive impact of retroactivity would be staggering. And since *McCarthy,* which was designed to enhance the determination of the voluntariness of a judicial confession of guilt, is not retroactive, it follows that *Jackson,* which was designed to facilitate the determination of the voluntariness of a pre-trial confession, should not be retroactive where the conviction rests on a plea of guilty, not on the pre-trial confession. Since *Jackson* does not warrant retroactive application in such cases, the unavailability of *Jackson* hearings has no constitutional significance in assessing a plea of guilty that was entered before *Jackson.* And with *Jackson* removed from consideration, the decisions of the Circuit court crumble.

Conclusion

The judgments of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

100 Defendants Who Pleaded Guilty in Non-Homicide Felony Cases prior to *Jackson* v. *Denno*

The following 100 cases, selected at random from the files of the New York County District Attorney's Office, involve indicted defendants who pleaded guilty prior to June 22, 1964, the date of *Jackson* v. *Denno*, 378 U.S. 368.

In 83% of these cases, the defendant had made a statement to the police.

Defendant	*Indictment Number*	*Date of Plea*	*Statement to Police*
1. Kenneth Curtis	333-58	2/28/58	X
2. Edward Thompson	806-58	3/21/58	X
3. James Felder	1764-58	6/11/58	X
4. Hewie Chavers	2367-58	7/22/58	X
5. Leroy Nelson	2763-58	8/20/58	
6. Angelo Gonzalez	1272-58	9/17/58	X
7. Hector Laboy	3144-58	9/26/58	X
8. Arthur Simonson	3719-58	12/23/58	X
9. George Hill	4205-58	12/27/58	X
10. Frank Auleta	447-59	2/26/59	X
11. John Frost	65-59	3/3/59	X
12. William Davis	507-59	3/4/59	X
13. Carl Hendrix	403-59	3/20/59	X
14. Everett James	542-59	4/17/59	X
15. John Cramer	988-59	5/6/59	X
16. Irving Bowen	1475-59	5/14/59	X
17. Arthur Gould	1665-59	5/20/59	X
18. Caroline Chu	1616-59	6/8/59	X
19. Grace Collins	1299-59	6/8/59	X
20. Philip Walker	2287-59	7/29/59	X

Defendant	*Indictment Number*	*Date of Plea*	*Statement to Police*
21. Pacfuzo Davilar	2382-59	8/26/59	X
22. Carlos Vasquez	3013-59	9/11/59	X
23. (Bruno Boone	685-59	10/8/59	X
24. (Haywood Boykin	685-59	10/8/59	X
25. John Bocca	943-59	10/14/59	X
26. Cannon Smith	3694-59	10/27/59	X
27. Norman Bell	2212-59	12/1/59	X
28. Freddie Butler	4234-59	12/24/59	X
29. Helen Bivines	4955-59	1/22/60	X
30. Edward Stewart	345-60	2/15/60	X
31. Carmello Ortiz	684-60	2/26/60	X
32. (Ernest McCullough	507-60	3/2/60	
33. (Raymond Pittman	507-60	3/2/60	
34. John McCoach	1048-60	4/4/60	X
35. Trudel Halman	781-60	4/7/60	X
36. James S. Johnson	1383-60	5/16/60	X
37. John Sawyer	1702-60	6/3/60	X
38. Joseph Weaver	2703-60	6/29/60	X
39. Miguel Sanchez	3390-60	9/20/60	X
40. Romulus Staton	2170-60	10/24/60	X
41. Pedro Roman	2454-60	10/27/60	X
42. Roger King	4382-60	11/16/60	X
43. Alexander Alick	4636-60	12/8/60	
44. Agnes Collins	4115-60	1/17/61	X
45. Eduardo Cepero	203-61	1/27/61	X
46. Seamon Drayton	5174-60	1/29/61	
47. William Hernandez	497-61	4/5/61	X

48. Mita Petrov	1856-61	4/27/61	X
49. Randolph Scott	5374-60	5/4/61	X
50. Herman Mayo	1337-61	5/10/61	
51. (Multry Ward	1733-61	5/16/61	X
52. (Chester Jackson	1733-61	5/16/61	X
53. Ronald Lewis	1935-61	6/21/61	X
54. Waldo Wilson	2509-61	7/13/61	X
55. James Rodgers	2765-61	8/14/61	X
56. Bernardo Jones	3304-61	9/27/61	X
57. Joseph Bernesser	3574-61	10/26/61	X
58. John Corry	3554-61	11/21/61	X
59. Edward Miles	4382-61	12/19/61	
60. Norval Finney	3865-61	1/8/62	
61. Louise Butler	3078-61	2/2/62	X
62. Ephraim Santo	1781-62	2/19/62	X
63. Vencencio Tilano	23-62	2/20/62	X
64. Seymour Berg	4703-61	2/28/62	
65. Clarence Haynes	364-62	3/7/62	X
66. James Gigueroa	435-62	3/16/62	
67. (Isaac Thompson	835-62	3/19/62	X
68. (Alfred Jacobus	836-62	3/19/62	X
69. Fernando Moulier	717-62	3/23/62	
70. Elmer Witcher	904-62	4/13/62	X
71. Nancy Reid	702-62	4/13/62	X
72. Anthony Madalno	259-62	4/30/62	X
73. Nathan Westpoint	1455-62	5/17/62	X
74. James Jones	897-62	6/20/62	
75. Henry Le Clair	1872-62	6/22/62	X

	Defendant	*Indictment Number*	*Date of Plea*	*Statement to Police*
76.	Michael Amengual	2404-62	6/28/62	X
77.	Julio Marrero	3307-62	8/30/62	
78.	Robert B. Taylor	3400-62	9/26/62	
79.	Jesus Rivera	3971-62	11/23/62	X
80.	Miguel Lamboy	4100-62	11/23/62	X
81.	David Simon	2921-62	12/10/62	X
82.	Stanley Spearman	4569-62	1/8/63	X
83.	Frank Torres	174-63	2/19/63	X
84.	Oswald White	506-63	3/7/63	X
85.	Robert Lewis	993-63	4/5/63	X
86.	Robert Fagan	802-63	4/15/63	
87.	Curtis Harris	1618-63	5/23/63	X
88.	Eleodow Santell	1265-63	5/24/63	X
89.	Heywood Kirk	2508-63	7/15/63	
90.	William Robinson	2150A-63	7/23/63	X
91.	Ruiz Santos Valentin	3673-63	10/17/63	X
92.	Harold Buffaloe	2792-63	10/25/63	
93.	John E. Bozulis	4101-63	11/14/63	X
94.	Mel Cole	4001-63	11/19/63	X
95.	Raymond Brooks	597-64	2/25/64	X
96.	Louise Caloca	1095-64	4/3/64	X
97.	Henry Hymes	559-64	4/15/64	X
98.	Emory Schreiber	942-64	4/22/64	X
99.	Samuel Irizzary	564-64	4/27/64	X
100.	Luciano Barcone	1452-64	6/18/64	X